FEB 9 2001

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Supreme Court, U.S.
FILED
FEB 9 2001
OFFICE OF THE CLERK

NO. 00-849

IN THE

Supreme Court of the United States

CARVER DAN PEAVY, ET UX.,

Cross-Petitioners,

v.

WFAA-TV, INC., ET AL.,

Cross-Respondents.

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

RESPONSE TO CROSS-PETITION FOR WRIT OF CERTIORARI

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February 9, 2001

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CORPORATE DISCLOSURE STATEMENT

WFAA-TV, Inc. is now WFAA-TV, L.P. Its general partner is WFAA-TV of Texas, Inc., and its limited partner is WFAA Holdings, Inc. Pursuant to Rule 29.6 of the Rules of this Court, petitioner states that the A.H. Belo Corporation, a publicly held corporation, owns more than 10% of its stock.

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RESPONSE TO CONDITIONAL CROSS-PETITION FOR WRIT OF CERTIORARI

Cross-petitioners Dan and Sally Peavy have filed a conditional cross-petition raising two questions:

Whether the Fifth Circuit correctly held that the federal wiretap statute, 18 U.S.C. § 2510 *et seq.*, does not create a private right of action for "procuring" another person to intercept a wire, oral, or electronic communication.

Whether the Fifth Circuit properly declined to rule on petitioners' argument that the statutory suppression rule of 18 U.S.C. § 2515 prohibits a defendant in a civil lawsuit from introducing the contents of illegally intercepted communications into evidence to defend against state-law claims or to support affirmative defenses to liability under the federal wiretap act.

Although the Fifth Circuit's judgment with respect to these issues was plainly correct, and although the Peavys have not identified any relevant circuit conflicts, cross-respondents WFAA-TV and Robert Riggs do not oppose the grant of certiorari on these questions. WFAA-TV and Riggs have themselves petitioned for certiorari concerning two different aspects of the Fifth Circuit's decision:

(1) the Court of Appeals' holding that the First Amendment permits the imposition of civil liability on a media defendant under 18 U.S.C. § 2511(1)(c) and (d), and a parallel Texas state wiretap statute, for using or disclosing the contents of illegally intercepted communications – a question similar to that presented in *Bartnicki* v. *Vopper*, No. 99-1687, and *United States* v. *Vopper*, No. 99-1728, *cert. granted*, 120 S. Ct. 2716 (June 26, 2000) (oral argument Dec. 5, 2000); and

(2) the Fifth Circuit's holding that 18 U.S.C. § 2511(1)(c) and (d), which require a showing that the defendant "know[s] or ha[s] reason to know that the information was obtained . . . in violation of this subsection," permit the imposition of liability even if the defendant can show, on the basis of advice from law

enforcement officials, legal counsel, or similarly authoritative sources of information, that he was not aware of the statutory prohibition.

The questions presented by WFAA-TV and Riggs are important questions of federal law with respect to which this Court's review is urgently required. After granting certiorari on the questions presented by WFAA-TV and Riggs, this Court may wish to consider the full array of statutory interpretation issues arising under the federal wiretap law. According, WFAA-TV and Robert Riggs do not oppose the grant of certiorari on the questions presented by the Cross-Petition, although the Peavys' legal arguments have no merit.

ARGUMENT

I. THE FIFTH CIRCUIT CORRECTLY HELD THAT THERE IS NO PRIVATE RIGHT OF ACTION FOR "PROCUREMENT."

The Fifth Circuit correctly held that the federal wiretap statute, 18 U.S.C. § 2510 *et seq.*, does not create a private right of action for "procuring" another person to intercept a wire, oral, or electronic communication. Pet. App. in No. 00-691, at 10a-12a. The question is resolved by the statutory text of the provision authorizing a civil damages remedy, 18 U.S.C. § 2520. Prior to its amendment in 1986, that provision stated:

> Any person whose wire or oral communication is intercepted, disclosed, or used in violation of this chapter shall (1) have a civil cause of action against any person who intercepts, discloses, or uses, *or procures any other person to intercept, disclose, or use such communications*, and (2) be entitled to recover from any such person [damages, attorney's fees, and costs].

18 U.S.C. § 2520 (1970) (emphasis added). But the "or procures

any other person" language was deleted when the section was amended in 1986. Pet. App. in No. 00-691, at 10a-11a. As amended, § 2520 currently provides, in pertinent part, that

> any person whose wire, oral, or electronic communication is intercepted, disclosed, or intentionally used in violation of this chapter may in a civil action recover from the person or entity which engaged in that violation such relief as may be appropriate.

18 U.S.C. § 2520(a) (Supp. 2000).

Thus, in 1986 Congress deleted the statutory language authorizing a private right of action for "procuring" an interception. Civil liability under 18 U.S.C. § 2520(a) extends only to "the person or entity which engaged in *that violation*." (emphasis added). The "violation" in question is defined as "intercept[ing], disclos[ing], or intentionally us[ing]" a communication – not as "procuring" another person to engage in such conduct. As the Fifth Circuit observed, "'that violation' refers only to illegal interception, disclosure, or use, and not to procuring interception by another." Pet. App. in No. 00-691, at 12a. "[T]here is no mention" in the civil remedy provision of liability for "procuring." *Id.*

The Fifth Circuit's conclusion is plainly correct and does not conflict with any decision by any other court identified by the Peavys. The court of appeals faithfully applied the principles of statutory construction established by this Court and gave meaning to the 1986 congressional amendment. See *Stone* v. *INS*, 514 U.S. 386, 397 (1995) ("When Congress acts to amend a statute, we presume it intends its amendment to have real and substantial effect.").

The Peavys' criticism of the Fifth Circuit's decision is flawed. The Peavys contend that the phrase "that violation" in § 2520(a) refers not to the earlier part of the same sentence in § 2520(a) but instead to *another* section of the wiretap act

(§ 2511(1)(a-d)) located some nine statutory provisions away. Cross-Pet. at 8. Plainly, there is no grammatical or logical basis for the suggestion that the antecedent for the phrase "that violation" is located in such a distant place in the statute.

The Peavys also contend, citing the legislative history of the 1986 amendment, that the Fifth Circuit's decision does not promote Congress' intent. Cross-Pet. at 8-11. But the Peavys cannot adduce any legislative history indicating that Congress meant to retain a *civil* remedy for "procuring." Moreover, it is impermissible in this case to resort to legislative history to vary the meaning of the statutory text because, "[g]iven the straightforward statutory command, there is no reason to resort to legislative history." *United States* v. *Gonzales*, 520 U.S. 1, 6 (1997). In any event, the Fifth Circuit's interpretation fully effectuates the statutory purpose of the wiretap statute, as well as the portion of § 2511(1)(a) prohibiting "procuring," because the statutory ban on "procuring" interception by another person is enforced through *criminal* proceedings rather than through private *civil* remedies.

The court of appeals was thus correct in holding that there is no federal private right of action for "procuring" an interception under the federal wiretap act.

II. THE FIFTH CIRCUIT PROPERLY DECLINED TO REVIEW THE STATUTORY SUPPRESSION ISSUE.

The Fifth Circuit properly declined to rule on petitioners' argument that 18 U.S.C. § 2515 prohibits a defendant in a civil lawsuit from introducing the contents of illegally intercepted communications into evidence to defend against state-law claims or to support affirmative defenses to liability under the federal wiretap act. The Fifth Circuit held that, "[i]n light of our disposition of the other issues" – such as the First Amendment and scienter questions on which WFAA and Riggs have sought certiorari – "we need not address this issue." Pet. App. in No. 00-691, at 59a.

Even if the Fifth Circuit had reached the merits of the statutory suppression issue, it would have been justified in rejecting the Peavys' argument. Section 2515 does not apply in the same proceeding in which a plaintiff is seeking to establish a violation of the federal wiretap statute. Before a court can decide whether there has been a violation of the wiretap statute, it must consider the contents of an intercepted electronic communication in order to determine whether the defendant has "used" or "disclosed" the substance of that communication, and whether the defendant may avail himself of any affirmative defenses. It would put the cart before the horse to *assume*, at the outset, that a violation of the wiretap statute has occurred. See S. Rep. No. 1097, 90th Cong., 2d Sess., *reprinted in* 1968 U.S.C.C.A.N. 2112, 2188 ("For example, such use and disclosure would be necessary in the investigation and prosecution of an illegal wiretapper himself.").

The need to consider the contents of a media defendant's expression is particularly acute in a case like this, where the defendant did not broadcast any intercepted communications verbatim but rather is alleged only to have divulged the contents of the interception by means of *other* news reports. That is precisely why WFAA and Riggs have urged that the prohibition of 18 U.S.C. § 2511 is properly subject to strict scrutiny as a content-based restriction on speech.

Indeed, application of Section 2515 in the manner proposed by the Peavys would violate defendants' right to be heard in their own defense and would therefore infringe the right to due process guaranteed under the Fifth Amendment. The Peavys may not seek millions of dollars from WFAA and Riggs based on the Harman tapes and then rely on Section 2515 to thwart their ability to defend against these baseless charges. "Due process requires that there be an opportunity to present every available defense." *Lindsey v. Normet*, 405 U.S. 56, 66 (1972) (citation omitted).

Accordingly, the Peavys' construction of Section 2515 has no basis in statutory text or purpose, nor is it consistent with due process. Every court to have considered the issue has concluded that the statutory suppression rule does not prevent a court from examining the intercepted communication in order to determine whether there has been a violation of the federal wiretap statute. The First Circuit held, in a decision endorsed by the Peavys (see Cross-Pet. at 14-15), that the statute assumes "(1) that the intercepted material will be presented to a court or jury for an initial adjudication of whether it was acquired illegally; and (2) that a court will thereafter determine whether other evidence was derived from the intercepted evidence." *Williams* v. *Poulos*, 11 F.3d 271, 289 (CA1 1993); see also *Nix* v. *O'Malley*, 160 F.3d 343, 351 (CA6 1998) (noting judicial recognition of "an implied 'adjudication exception' that permits disclosure of intercepted material to a court for admissibility determinations and to a court or jury for a resolution of illegality"); *United States* v. *Underhill*, 813 F.2d 105, 112 (CA6), *cert. denied*, 482 U.S. 906 (1987) (ruling intercepted communications admissible because suppression "would produce an absurd result that we are confident Congress did not intend"); *McQuade* v. *Michael Gassner Mechanical & Elec. Contractors, Inc.*, 587 F. Supp. 1183, 1188, 1190-91 (D. Conn. 1984) ("Section 2515 was no more designed to keep defendants in lawsuits brought under § 2520 from defending the alleged violations of § 2511 than it was to keep the Government from prosecuting violators under § 2511"; "If the court were to accept the position urged by plaintiffs * * * plaintiffs themselves would be seriously hampered, if not completely foreclosed, from proving their case at trial."); *United States* v. *Liddy*, 354 F. Supp. 217, 220 (D.D.C. 1973), *rev'd in part*, No. 73-1020 (CADC Jan. 19, 1973) (allowing admission of intercepted communications).

Moreover, numerous courts have allowed the disclosure and use of the contents of illegally intercepted communications in order to impeach testifying criminal defendants. See *United*

States v. *Echavarria-Olarte*, 904 F.2d 1391, 1397 (9th Cir. 1990); *United States* v. *Vest*, 813 F.2d 477, 484 (CA1 1987); *United States* v. *Winter*, 663 F.2d 1120, 1154 (CA1 1981), *cert. denied*, 460 U.S. 1011 (1983); *United States* v. *Caron*, 474 F.2d 506, 508 (CA5 1973). By analogy, evidence obtained in violation of the Fourth Amendment can be used for the limited purpose of attacking a testifying defendant's credibility. See *United States* v. *Havens*, 446 U.S. 620, 627 (1980); *Walder* v. *United States*, 347 U.S. 62, 65 (1954).

The Peavys contend that the district court considered the contents of the intercepted communications for purposes beyond those contemplated by these established exceptions. Cross-Pet. at 15. The record does not support that assertion. Rather, the district court considered the contents of the tapes only in deciding whether the tapes involved matters of public significance, Pet. App. in No. 00-691, at 93a-94a – a holding that the Peavys did not even challenge on appeal. Hence, the district court's denial of the motion to suppress had no impact on the Peavys.

Contrary to the Peavys' claim, the district court nowhere indicated that it would consider the contents "to show that the Peavys are such bad people that they don't have rights worthy of protection." Cross-Pet. at 15. Nor did the district court consider the contents of the communications as part of WFAA's affirmative defenses to the Peavys' state-law claims. Rather, the district court considered the contents only in the course of deciding whether the *Peavys* had made out the elements of a state-law claim of public disclosure of embarrassing private facts. Under Texas law, it was the Peavys' burden to demonstrate that "the publicized information contains highly intimate or embarrassing facts" and that "the publication of this information would be highly objectionable to a reasonable person." Pet. App. in No. 00-691, at 103a. The Peavys can hardly complain about this aspect of the district court's decision, which was triggered by a state common-law claim that the

Peavys themselves had decided to pursue. In any event, the Peavys did not appeal the district court's dismissal of their state common-law claims, so those claims are no longer at issue in this case.

Hence, even if the Fifth Circuit had reached the merits of the statutory suppression issue, it would have been compelled to affirm the district court's judgment.[1]

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[1] Because the Fifth Circuit did not reach the question presented by the Peavys, it did not decide the additional grounds offered by WFAA and Riggs for affirming the district court's denial of the Peavys' motion to suppress: Section 2515 is not applicable against parties who lawfully receive a tape of an intercepted communication, such as WFAA and Riggs. *United States* v. *Murdock*, 63 F.3d 1391 (CA6 1995) (upon which the Government relied in defeating Peavy's motion to suppress in a criminal trial). In addition, Section 2515 is not applicable in this case because the radio frequencies intercepted by the Harman's police scanner were electronic communications, 18 U.S.C. §§ 2515, 2510(10)(a); *Steve Jackson Games* v. *United States Secret Service*, 36 F.3d 457, 461 (CA5 1994); because the Peavys failed to show that the intercepted calls affected interstate or foreign commerce, as required by § 2510(1), (12); *United States* v. *Burroughs*, 564 F.2d 1111, 1113-14 (CA4 1977); and because many significant aspects of the Harman tapes have become public knowledge as a result of Peavy's public criminal proceedings. These alternative grounds remain available to WFAA and Riggs as reasons for affirming the district court's denial of the motion to suppress.

CONCLUSION

The petition for certiorari in No. 00-691 should be granted. WFAA and Riggs have no objection to this Court's granting review of the questions presented in the Cross-Petition, although the Peavys' legal arguments have no merit.

Respectfully submitted.

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